No. 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, American Overseas Warehouse Company, Inc.,
Appellant and Cross-Appellee,

vs.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants.

BRIEF OF DEFENDANT, R. T. McDONNELL, IN REPLY TO PLAINTIFFS' BRIEF AS CROSS-APPELLANTS, AND TO THEIR MOTION TO DISMISS THE APPEAL.

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PRELIMINARY STATEMENT.

This brief was written in reply to plaintiffs' brief on the cross-appeal. After it was finished plaintiffs, on Monday, June 10th, gave notice of motion to dismiss the appeal. Although hampered by the fact that but two days remained before the due date of this brief, we have, in the

interest of putting as much of our side of the case as possible under one cover, included herein an argument in opposition to the motion to dismiss. This seemed particularly desirable in view of the fact that plaintiffs' brief on the cross-appeal deals with the whole case and only incidentally with the cross-appeal as such. We have necessarily had to follow the range of plaintiffs' brief in this reply, but by so doing we hope to spare the court the burden of a further brief from us on the main appeal.

ARGUMENT.

I.

ANSWER TO THE MOTION TO DISMISS.

First: This is a suit in equity and not an action at law. The whole record is properly presented for review.

The grounds of the motion to dismiss are:

"1 The appeal presents no question of sufficiency of the evidence to support the judgment;

2 The appeal presents no error apparent on the face of the record."

These manifestly, we submit, are not grounds for dismissing the appeal. The absence of error is ground for affirmance, but so far as we have been able to find, it is not a ground for dismissal. The court obviously cannot determine whether or not there was error below, either apparent on the face of the record or otherwise, unless it considers the appeal (see *Bradley v. Eccles* (2nd C. C. A.) 120 Fed. 945, 952).

Aside from the foregoing, there is, we submit, in the inherent nature of the case, no merit either in plaintiffs'

motion to dismiss, or in the suggestion made in their brief on the cross-appeal (pp. 2-3), that the right of review is limited to errors apparent on the face of the record. Plaintiffs, in this behalf, are obviously invoking the rule that the only matters presented for appellate review *in an action at law* are errors apparent on the face of the record, unless a motion for judgment is made below and an exception reserved to an adverse ruling thereon (*Wulfsohn v. Russo-Asiatic Bank* (9th C. C. A.) 11 F. (2d) 715, 716; *China Press v. Webb* (9th C. C. A.) 7 F. (2d) 581, 582).

Nowhere do plaintiffs cite authority for their assumption that this is an action at law. We submit that it is not an action at law, but a suit in equity, in which, on settled principles, the whole record is properly before the court for review.

The proceeding is for the ratable distribution of the proceeds of the sale of a commingled mass of foods. In our former brief (Brief for Appellant, p. 18), we cited authorities holding that such a proceeding can only be maintained in equity. For convenience of reference we again cite and quote from these authorities.

In *Dows v. Ekstrone* (C. C. Minn.) 3 Fed. 19, the court stated the case and its ruling as follows (pp. 19-20):

> "Harris, the warehouseman who issued the receipts, either never received in store all the wheat represented as received, or, after receiving it, he sold or disposed of a portion of it.
>
> Just prior to the commencement of this suit he absconded, leaving in his warehouse only about 3,000 bushels of wheat to meet the outstanding receipts, or only about one-fifth the quantity required. In this state of things the creditors, represented by the de-

fendant, attached all the wheat in the warehouse as the property of Harris, and the plaintiffs, holding a majority of the receipts, replevied from defendant, claiming that their receipts entitled them to what was left. *Can they recover? Clearly not. When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting.* No one of such receipt holders can recover at law the whole, nor could any number of such holders, less than the whole number, recover possession as against the remainder. *This case must be brought in a court of equity,* where all the claimants can be heard and decree can be rendered establishing the rights of each with respect to the property in controversy. *It is a controversy which cannot be settled at law.* I will, therefore, direct that a juror be withdrawn, and that either party have leave to file a bill in chancery'' (italics ours).

In *Dole v. Olmstead,* 36 Ill. 150, a case which, like the foregoing case, involved the ratable distribution of a deficient quantity of warehoused grain, the court said (pp. 154-155):

''The only remaining question, is, whether a court of equity has jurisdiction of the case. By the assignment, appellants became trustees for all parties in interest, and as such became liable to perform all the duties imposed by that relation.

One of the duties of that relation is, to account for the proper application of the trust fund. And a court of equity, as a part of its original and inherent jurisdiction, compels the proper application of the trust funds, and requires the trustee to render an account of his proceedings under the trust. Had this property remained separate, it would be different, as in that case, the loss of each owner could have been ascertained, and the remedy at law would have been com-

plete. *It will also be observed, that there is not a complete remedy at law, as, by the confusion in the property, each party is disabled from showing the extent of his loss.* And those who should first sue would get more than their ratable portion of the property, appellants not being liable to make up the deficiency unless it could be shown that they had appropriated the grain to their own use. Thus a portion of the owners would be able to obtain no portion of the grain. And they would have no remedy except in a court of equity to compel contribution.

A court of equity has, therefore, jurisdiction to bring all the parties in interest before the court, and to do complete justice between them. It should ascertain the deficiency of the joint property, and decree that each joint owner share the loss in pro rata proportions'' (italics ours).

See also:

Hamilton v. Blair, 23 Ore. 64, 31 Pac. 197, 198 (''But to establish and enforce such ratable distribution the suit must be brought in equity * * *'').

Tobin v. Portland Flouring Mills, 41 Ore. 269, 68 Pac. 743, 745 (''If * * * a deficiency occurred in the quantity so commingled, rendering it impossible for a depositor to show the extent of his loss, a court of equity could afford relief by * * * apportioning the loss pro rata among the joint owners'').

Weiland v. Sunwall, 63 Minn. 320, 65 N. W. 628, 629 (holding that suit for ratable distribution of wheat must be in equity).

Since the suit is in equity, where an appeal is in theory a trial *de novo,* the whole case is presented for review (*O'Brien, Manual of Federal Appellate Procedure* (2 ed.) p. 57; 3 C. J. 314-315; see also *Wiscart v. D'Auchy,* 3 Dall. 321, 324; *Watt v. Starke,* 101 U. S. 247, 250-251; *Cincinnati*

v. Cincinnati etc. Traction Co., 245 U. S. 446, 454). An exception to a denial below of a motion for judgment or request for special findings is unnecessary, because "A bill of exceptions is altogether unknown in chancery practice" (*Ex parte Story,* 12 Pet. 339, 343; see also *Wilson v. Riddle,* 123 U. S. 608, 615; *Johnson v. Harmon,* 94 U. S. 371, 372; *Buessel v. United States* (2nd C. C. A.) 258 Fed. 811, 822; *Struett v. Hill* (9th C. C. A.) 269 Fed. 247, 249; *Southern etc. Assocn. v. Carey* (C. C. Tenn.) 117 Fed. 325, 330-331; *Continental Trust Co. v. Toledo etc. R. Co.* (C. C. Ohio) 99 Fed. 177; *Brinkley v. Louisville etc. R. Co.* (C. C. Tenn.) 95 Fed. 345, 351; 2 *Daniell's Chancery Pleading and Practice* (6th American ed.) p. 1113, *1120).

The fact that the part of the record containing the evidence in the present case is called a "bill of exceptions" (Tr. p. 53) is immaterial. Where a bill of exceptions is inadvertently settled in an equity case, it is to be considered as the statement of evidence required in equity practice (*United States v. Great Northern R. Co.* (9th C. C. A.) 254 Fed. 522, 526; *Goodwin v. United States* (6th C. C. A.) 295 Fed. 856, 858; *L. A. Westermann Co. v. Dispatch Printing Co.* (6th C. C. A.) 233 Fed. 609, 612; *O'Brien, Manual of Federal Appellate Procedure* (2nd ed.) p. 56).

Second: Even if this were an action at law, the case would be open to review for errors apparent on the face of the record. Such errors appear in the incorrect construction placed by the trial court on documents admitted by the pleadings, and in the nonjoinder of the Trading Corporation and The National City Bank, whom the pleadings show to be indispensable parties.

Even if this were an action at law, the case would still be open to review for errors apparent on the face of the record, that is, of the pleadings, process and judgment, notwithstanding that no motion for judgment was made or exception reserved below (*China Press v. Webb,* (9th C. C. A.) 7 F. (2d) 581, 582; *O'Brien, Manual of Federal Appellate Procedure* (2nd ed.) p. 8).

In the case at bar the complaint sets out a specimen of the documents held by plaintiffs (Exh. B, Tr. p. 6), alleging that it is typical of all these documents (Tr. p. 3). The answer admits these allegations (Tr. p. 12), but sets up the documents held by the National City Bank (Tr. p. 13). The existence of these documents is admitted by the reply, which quotes the endorsements made by the Warehouse Company in favor of the bank (Tr. p. 14).

The proper construction of these documents is, therefore, we submit, a question apparent on the face of the record, and plaintiffs, in their brief on the cross-appeal specifically so contend (Brief for Cross-Appellant, pp. 2-3). "The warehouse receipts and assignee's plan of distribution, and the cross-claimants 'godown warrants and trust receipts' * * * were parts of the pleadings" (Brief for Cross-Appellant, p. 43). Plaintiffs' motion to dismiss is directly contrary to the argument in their own brief.

There is a further error, apparent on the face of the pleadings, namely the nonjoinder of The National City Bank and its pledgor, the Trading Corporation, whom plaintiffs seek to exclude from participation in the fund. The Bank and the Trading Corporation, under the authorities already cited, are indispensable parties, and the fact that they are not joined in the suit is, in itself, a ground, apparent on the face of the record, for reversal of the decree (*National City Bank v. Harbin Electric Joint Stock Company* (9th C. C. A.) 28 F. (2d) 468, and cases there cited; Brief for Appellant, p. 19).

II.

ANSWER TO PLAINTIFFS' BRIEF ON THE CROSS-APPEAL.

The sole issue on the cross-appeal is the correctness of the ruling below allowing The National City Bank to participate ratably with plaintiffs in the proceeds of the sale of the flour with respect to the one godown warrant which it held (Tr. pp. 40-44, 50-51). The five transactions in which the Bank held assigned pledge agreements without godown warrants, are involved only on the main appeal (Brief for Appellant, pp. 2, 3, 5).

Plaintiffs' brief, however, deals only incidentally with the issue on the cross-appeal; it is principally an argument upon the main case, as appears from plaintiffs' statement of their position. They say (Brief for Cross-Appellants, pp. 1-2):

> "The only two issues on cross-appeal are of law.
>
> One: In this action of debt, in United States jurisdiction in China, where common law strongly prevails, defendant cross-claiming with profert in the plead-

> ings,—was the judgment on the cross-claim responsive?
>
> Two: On said cross-claim, which was on behalf of the National City Bank of New York,—were certain 'godown warrants or trust receipts' held by that Bank equivalent in law to the warehouse receipts held by plaintiffs, the Chinese Banks?''

As we said at the outset, we will answer the arguments of plaintiffs relating to both the main appeal and cross-appeal. We submit:

First: A decree allowing the bank to participate is clearly responsive to the pleadings (Answering Brief for Cross-Appellants, pp. 25-27).

Plaintiffs' argument that the decree, in so far as it favors The National City Bank, is not "responsive," we understand to be in substance as follows: (1) That this is an action of debt. (2) That in an action of debt "a writing proved to be the defendant's could not be contradicted. For if a man said he was bound, he was bound." (3) That "to the requirement of 'a writing proved to be the defendant's' * * * the judgment does not respond" (Brief for Cross-Appellant, pp. 25-26).

Plaintiffs nowhere specify what writing binds defendant so that he cannot contradict it, but we assume that their contention is that, since defendant admitted the validity of the warehouse receipts held by plaintiffs, he cannot "in this action of debt" set up the rights of The National City Bank in diminution of plaintiff's claims against the fund in his hands.

In reply to this contention we submit:

A. This is a suit in equity and not an action at law; further, if an action at law would lie under the facts of

this case, debt would be an improper form of action, because plaintiffs' claims are not for sums certain.

B. A decree recognising the rights of The National City Bank is clearly within the issues, and would be within the issues even under rules of pleading applicable in actions of debt.

C. Even if this suit were an action of debt, there would be no rule of law under which defendant's admission of the validity of plaintiffs' warrants would prevent his setting up any other proper defense to their claims.

A. This is a suit in equity and not an action at law; further, if an action at law would lie under the facts of this case, debt would be an improper form of action, because plaintiffs' claims are not for sums certain.

The authorities already cited (supra I, *First*) show, we submit, that this is a suit in equity, and is not and could not be an action at law. Further, and apart from this controlling consideration the suit manifestly could *not* be an action of debt. Debt would lie at common law only for "a sum certain of money or for the delivery of an ascertained amount of ponderable or measurable chattels" (*Street, Foundations of Legal Liability*, Vol. 3, p. 127; see also Chitty on Pleading, 13th American Ed. Vol. 1, p. 109). Whether the action was for money or chattels, certainty of the thing sued for was an indispensable requisite to its maintenance. So, in *Street, Foundations of Legal Liability*, the author says (Vol. 3, p. 135):

> "In the early history of the action of debt the requirement that the claim sued on should be for a sum certain of money or for an ascertained amount of

> ponderable chattels was rigidly insisted upon. It resulted that the plaintiff must always prove his claim to the exact extent sued for or he recovered nothing at all. To allege a debt for one amount and to prove for another was a fatal variance. This was apparently the rule, at least in theory, as late as Blackstone's day, and this writer tells us that if one brought an action of debt for thirty pounds and only proved twenty pounds he could no more recover than if in detinue he sued for a horse and proved that the defendant detained his ox."

At no stage of its history would the action lie except for a sum certain in money or measurable chattels; it was inherently limited to claims for the recovery of debts, *eo nomine* and *in numero* (*Carroll v. Green,* 92 U. S. 509, 513; *Stockwell v. United States,* 13 Wall. 531, 542; *Du Bois v. Seymour* (3rd C. C. A.) 152 Fed. 600, 602; see also *Blackstone's Commentaries,* Book 3, pp. 154-155; *Street, Foundations of Legal Liability,* Vol. 3, p. 126; *Holdsworth's History of English Law,* 3rd Ed. Vol. 3, p. 420, et seq.).

In this case the plaintiffs do not claim, and in the nature of the case could not claim, definite amounts of flour or money. As the court said in *Dole v. Olmstead,* 36 Ill. 150, 155, supra, a case similar to the present case: "* * * by the confusion in the property, each party is disabled from showing the extent of his loss." The very reason for this suit is that there was not enough flour in the hands of defendant to meet all the receipts, and plaintiffs, therefore, sue for pro rata shares of the sum for which, by consent, the flour has been sold. These pro rata shares necessarily depend upon extrinsic matters to be found by the court, such as the amount of flour left on hand, the number of bags of each brand and the number and

validity of the outstanding receipts. Indeed the court below readjusted certain claims of the plaintiffs among themselves because the claims were based on incorrect assumptions as to the number of bags of flour of various brands (Tr. pp. 47-48). The first principles governing actions of debt prevent its use under such circumstances (see *Cassady v. Laughlin,* 3 Blackf. (Ind.) 134; *Watson v. M'Nairy,* 1 Bibb. (Ky.) 356; *Bruner v. Kelsoe,* 1 Bibb. (Ky.) 487; *Snell v. Kirby,* 3 Mo. 21, and authorities cited supra).

B. A decree recognizing the rights of The National City Bank is clearly within the issues and would be within the issues even under rules of pleading applicable in actions of debt.

The pleadings are summarized in our former brief (pp. 5-7).

Plaintiffs call defendant's pleading a "cross-claim." This, however, is inaccurate terminology. If the present proceeding were, as plaintiffs incorrectly assume, an action of debt and not a suit in equity, the answer would properly be described as containing two pleas in bar, the first a traverse of plaintiffs' claim to all of the proceeds of the flour, and the second, a special plea in confession and avoidance setting up the rights of The National City Bank under the documents held by it. This manner of pleading would have been strictly proper at common law. So, in *Chitty on Pleading* (13th American ed.), the author says (pp. 525-526):

> "A plea in bar, unlike a plea in abatement, offers matter which is a conclusive answer or defence to the action upon the merits. It is obvious that such a plea must contain either, 1st, a *traverse* or denial of the plaintiff's allegations; or, 2ndly, an express or implied *admission* that such allegations are true,

with a statement of matter which destroys their effect. In other words, a plea in bar must *deny,* or *confess and avoid* the facts stated in the declaration. Pleas in bar are not therefore susceptible of any other division than, 1st, pleas of *traverse* or *denial;* 2ndly, pleas by way of *confession* and *avoidance.*

Pleas in *denial* are either the general issue in those actions in which so general a traverse is admissible, or they occur in instances in which, there being no general issue, as in covenant, etc., some specific fact is specially disputed. The doctrine of *Traverses* will be discussed in a subsequent part of the work.

The quality of a plea in *confession* and *avoidance* is more peculiar, and demands particular attention. A plea of this description is either in *justification* or *excuse* of the matters alleged in the declaration; as imprisonment under a magistrate's warrant, or *son assault demesne* in trespass; or it is in *discharge* of the same action by subsequent matter, as accord and satisfaction, or a release. It is observable that each of these pleas admit the mere *facts* stated in the declaration, as that the defendant committed the trespasses charged; that the *contract was made or the debt* was incurred, etc. But the matter which they allege by way of defence defeats or avoids the legal effect of those debts, and disapproves, if true, the plaintiff's right of action'' (author's italics).

Under these principles, to cite a few out of a multitude of possible examples, a defendant in debt has been allowed, by special plea in confession and avoidance, to show payment or setoff *(Merryman v. Wheeler,* 130 Md. 566, 101 Atl. 551, 552); an injunction against collection of the debt sued for (*Palmer v. Palmer,* 2 Miles (Pa.) 373); an accord and satisfaction *(M'Guire v. Gadsby,* 3 Call. (Va.) 234); a release *(Klair v. Philadelphia etc. R. Co.,* 2 Boyce (Del.) 274, 78 Atl. 1085, 1092); usury *(Nichols v. Stewart,* 21 Ill. 106), or *ultra vires (Conowingo Land Co. v. McGaw,* 124 Md. 643, 93 Atl. 222, 226).

C. Even if this suit were an action of debt, there would be no rule of law under which defendant's admission of the validity of plaintiffs' warrants would prevent his setting up any other proper defense to their claims.

The only authority cited by plaintiffs (Brief for Cross-Appellants, p. 25) for their contention that "in this action of debt" defendant's admission of the validity of plaintiffs' receipts precludes him from showing the right of The National City Bank to share with plaintiffs in the proceeds of the flour is the following passage from *Holmes, The Common Law*, from which, however, they omit the italicized part (pp. 261-262):

> "It is manifest that a witness oath, which disposes of a case by the simple fact that it is sworn, is not a satisfactory mode of proof. A written admission of debt produced in court, and sufficiently identified as issuing from the defendant, is obviously much better. *The only weak point about a writing is the means of identifying it as the defendant's, and this difficulty disappeared as soon as the use of seals became common. This had more or less taken place in Glanvill's time, and then all that a party had to do was to produce the writing and satisfy the court by inspection that the impression on the wax fitted his opponent's seal. The oath of the secta could always be successfully met by wager of law, that is, by a counter oath on the part of the defendant, with the same or double the number of fellow swearers produced by the plaintiff.* But a writing proved to be the defendant's could not be contradicted. For if a man said he was bound, he was bound."

Plaintiffs evidently interpret the foregoing to mean that, as a matter of law, no defense can be made in an action of debt to an apparent obligation evidenced by the defendant's signature. We submit that this is incorrect. The italicized part of the quotation, which plaintiffs do not quote, shows the true meaning of the sentences on which

plaintiffs rely, namely, that in Glanvill's time of which the author was speaking a writing signed by the defendant could not be contradicted *by wager of law.** This is demonstrated by a brief further reference to the context, which plaintiffs' fragmentary quotation disregards.

Justice Holmes, in the passage quoted, *was not writing about defenses to the action of debt,* but about the history of contract and particularly of the doctrine of consideration. This doctrine, like many another important principle of substantive law, he thought might have had its origin in "some forgotten circumstance of procedure" *(The Common Law,* p. 253). He suggested that consideration originated in the circumstance that in debt, the earliest contract action, one of the ways in which the plaintiff might make his preliminary proof was by the "oath of the *secta*" *(The Common Law,* p. 258), or "foreoath" of complaint witnesses *(Street, Foundations of Legal Liability,* Vol. 3, p. 24), and that it happened, for reasons which the author explains (pp. 257-258) that "when a debt was proved by witnesses there must be *quid pro quo*" (p. 258). In his development of this idea, Justice Holmes referred to the ways in which a plaintiff in debt might "maintain his cause." He said *(The Common Law,* pp. 254-255):

> "It was observed a moment ago, that, in order to recover against a defendant who denied his debt, the plaintiff had to show something for it; otherwise he was turned over to the limited jurisdiction of the spiritual tribunals. This requirement did not mean

*The wager of law was later allowed as a defense to any action of debt on a simple contract, although it was never permitted in defense to an instrument under seal (*Holdsworth, History of English Law* (3rd ed.) Vol. 1, p. 423; *Holmes, The Common Law,* p. 263; *Street, Foundations of Legal Liability,* Vol. 3, pp. 138-139).

> evidence in the modern sense. It meant simply that he must maintain his cause in one of the ways then recognized by law. These were three, the duel, a writing, and witnesses."

This is the same "writing" which is later referred to in the passage quoted by plaintiffs where the author tells why a writing was a more satisfactory method than the "oath of the *secta*" for making the plaintiff's proof, and therefore why the oath of the *secta* fell into disuse. This discussion, as above stated, is in development of the author's suggestion that the procedure regarding the witness oath contained the germ of the doctrine of consideration. Both the witness oath and the "writing" are discussed in connection with the maintenance of the plaintiff's case, not in connection with defenses.

Nowhere in the discussion is there any suggestion of such a rule as that for which plaintiffs here contend, namely, that no defense can be made in debt to an obligation evidenced by a writing of the defendant. Manifestly, no such rule could exist. To illustrate, let us assume a promissory note, which is a clear instance of a case wherein "a man said he was bound" and wherein debt was a proper form of action. On plaintiffs' theory no defense at common law could be made to an action of debt upon the note if the signature of the defendant was proved. But it is elementary that the defendant in debt, either under the general issue in a proper case, or under special pleas in abatement or in bar, might show lack of consideration or failure of consideration or any other of the many defenses which the circumstances might justify, such as, in this case, the outstanding right of a third person to part of the debt claimed (18 C. J., pp. 15-18, and authorities cited supra).

Second: The National City Bank, as assignee of valid pledges made by the Trading Company to the Warehouse Company, and as holder of the Warehouse Company's receipts evidencing the deposit of the flour subject to the pledges, is entitled to participate ratably with the other receipt-holders in the distribution of the proceeds of the sale of the flour (Answering Brief for Cross-Appellants, pp. 29-43).

In answer to the parts of plaintiffs' Point Two (Brief for Cross-Appellant, p. 29) in which they attack the validity of the original pledge by the Trading Corporation to the Warehouse Company and the assignment of the pledge by the Warehouse Company to The National City Bank, we submit:

A. The Trading Corporation made actual delivery of flour to the Warehouse Company in pledge. The trial court so found. Its finding is supported by the recitals of the pledge agreements, and there is no evidence to the contrary.

B. The claim of the plaintiffs that the pledge was "fraudulent on the part of the warehouse" is outside the record and is also wholly immaterial, there being no claim or suggestion that the Bank had any knowledge of the alleged fraud.

C. It was not necessary to the validity of the assignment of the pledge that the Warehouse Company, the original pledgee, should have delivered possession of the flour to the Bank as assignee. Transfer of possession is required to make a pledge valid in its inception but is not necessary to establish a valid assignment of the pledgee's rights.

Other contentions made by plaintiffs under their Point Two we will discuss after presenting the foregoing points (infra, *Second,* D).

A. The Trading Corporation made actual delivery of flour to the Warehouse Company in pledge. The trial court so found. Its finding is supported by the recitals of the pledge agreements, and there is no evidence to the contrary.

The recitals in the pledge agreements and in the assignments thereof to the effect that the flour had been delivered by the Trading Corporation to the Warehouse Company, and was held by the Warehouse Company to the order of the Bank, as assignee of the pledge (Exh. 1, Tr. pp. 16, 19; see also Brief for Appellant, pp. 4 and 5), are amply sufficient to support the finding of the trial court that there was an actual delivery of the flour by the Trading Corporation to the Warehouse Company in pledge. *The agreements containing these recitals were received without objection from plaintiffs* (Tr. p. 54), *and there is no contrary evidence.*

In *Maryland Casualty Co. v. Washington Loan & Banking Co.* (Ga.) 145 S. E. 761, a warehouse company had issued receipts to the plaintiff bank as pledgee to secure the warehouse company's debt. The receipts carried a statement by the warehouse company that the cotton covered thereby was on hand and free of encumbrances. In a suit on the warehouse company's bond the defendant claimed that the complaint did not show a valid pledge of the warehouse receipts, for the reason that it did not allege that the warehouse company had free cotton on hand at the time it issued the receipts. The court held that the recitals of the receipts made the necessary showing in this behalf. The court said (p. 765):

> "Again it is insisted that the petition of the bank does not allege that the receipts represented actual bales of cotton stored in the warehouse. This is not necessary. The petition alleges that the warehouse company issued receipts for marked and designated

bales of cotton. These receipts recited that this cotton was stored in the warehouse of the warehouse company, and that the cotton would be delivered to the order of that company. These receipts were indorsed by the warehouse company and pledged by it to secure the debt of the company to the bank. *These allegations were tantamount to a statement that this cotton was actually in the warehouse at the time the receipts were issued. The clear presumption from these facts is that the cotton was in the warehouse at the time the receipts were issued.* Certainly the bank, in extending credit to the warehouse company, was authorized to act upon the statement in these receipts that the cotton was stored in the warehouse, and would be delivered on the order of the warehouse company. The indorsement of these receipts by that company was such an order. Upon the indorsement and delivery of these receipts, the relation of bailor and bailee between the bank and the warehouse was created'' (italics ours).

See also:

Parshall v. Eggert, 54 N. Y. 18, 23, 25;

Hibbard v. Merchants' Bank, 48 Mich. 118, 11 N. W. 834, 836.

There is no evidence contrary to the recitals in the pledge agreements that the flour was delivered to and held by the Warehouse Company in pledge. The only evidence offered by plaintiffs in opposition to these recitals was a translation of a tally book kept in Chinese by a Chinese employee of the Warehouse Company. No testimony was offered to authenticate this book except certain questions which plaintiffs asked of defendant (Tr. pp. 55, 51). Plaintiffs did not produce the man who made the entries, although he was available (Tr. p. 60). No showing was made that the book contained original entries, or that it had been regularly kept. On the contrary, it appeared

from defendant's testimony that the book did not contain the godown keeper's complete record, and that there was no way of checking its correctness (Tr. pp. 60-61). The trial court sustained defendant's objection to the book (Tr. pp. 61-62). Plaintiffs have not questioned the correctness of this ruling, and we will, therefore, not discuss it further.

B. The claim of plaintiffs that the pledge was "fraudulent on part of the warehouse" is outside the record and is also wholly immaterial, there being no claim or suggestion that the Bank had any knowledge of the alleged fraud.

Plaintiffs claim that the pledge agreements were "fraudulent on part of the warehouse" (Brief for Cross-Appellants, p. 6).

To this the answer might be made that even if the fact were as plaintiffs say, it would not affect the rights of the Bank, there being no suggestion that the Bank had knowledge of the alleged fraud.

To quote from *Bush v. Export Storage Co.* (C. C. Tenn.), 136 Fed. 918, 934:

> "It is very true, as plaintiffs' able counsel has so clearly said, that 'good faith does not make good a pledge, unless there has been a delivery of possession, either actual or constructive.' * * * On the contrary, it is equally true that, if these warehouse receipts had their origin in a valid pledge, they passed to the defendant banks as innocent holders, as symbolic representatives of property, and their defense as assignee for value in good faith is a complete answer to every other objection urged in support of this bill. Their defense as assignees for value in good faith is good against every other ground on which this suit rests. *And nothing in the dealings or methods between the pledgor and warehouse companies as bailees before or subsequent to a valid pledge of*

property which once passed into the hands of an innocent holder could affect or destroy the rights of such holders'' (italics ours).

It is, of course, manifest that the Warehouse Company was guilty of a most aggravated fraud in the misappropriation of more than a million bags of flour belonging to innocent holders of outstanding documents. But the Bank was as much a victim of this fraud as were the plaintiffs. Plaintiffs manifestly cannot improve their case at the expense of the Bank by reiterating the admitted fraud which caused their common misfortune.

Plaintiffs also say (Brief for Cross-Appellants, pp. 28-29):

> ''The principal client, although not the only client of the Warehouse Company, was a Chinese concern known as the Union Trading Corporation. This Company failed in July, 1927, involving the Warehouse Company which had been its chief instrument in respect of a series of extensive frauds. It was the custom of the Union Trading Corporation to store, or to purport to store, with the Warehouse Company flour and other merchandise, export and import, and to borrow money of the Chinese Banks on the security of the relative godown warrants. It was also its custom to borrow money from the Warehouse Company and to secure it, or to purport to secure it, by deposit or alleged deposit of goods by way of collateral security. In the former case a document of title was issued the signer of which, the Warehouse Company,
>
> 'was estopped or not permitted to deny the existence of the facts represented in or by them.' *Hale v. Milwaukee Dock Co.,* 29 Wis. 482, 9 Am. Rep. 603.
>
> In the latter case at most the warehouse company acquired a special property in the goods as pledgee. * * *''

The relations between the Warehouse Company and the Trading Corporation are, we submit, clearly immaterial (*Bush v. Export Storage Co.* (C. C. Tenn.) 136 Fed. 918, 934, quoted supra). Furthermore, plaintiffs' statements in this behalf are outside the record, and are, therefore, not entitled to consideration. Since, however, plaintiffs have seen fit to make them, we may say in reply that they demonstrate the absolute lack of any substantial ground for preferring plaintiffs' claims over those of The National City Bank. On plaintiffs' own statement, there is not a scintilla of substantial difference between the claims. The Bank and plaintiffs were both lenders of money for the benefit of the Trading Corporation, on the security of documents issued by the Warehouse Company and calling for warehoused flour. The only difference is the purely formal difference that the plaintiffs' documents were all called godown warrants, whereas in five out of the six cases the documents of The National City Bank were not called godown warrants. This, however, is a mere matter of names, which, we submit, will not be allowed to determine the rights of the parties (Brief for Appellant, pp. 19-21).

C. It was not necessary to the validity of the assignment of the pledge that the Warehouse Company, the original pledgee, should have delivered possession of the flour to the bank as assignee. Transfer of possession is required to make a pledge valid in its inception, but is not necessary to establish a valid assignment of the pledgee's rights.

The circumstance that The National City Bank did not obtain possession of the pledged flour in no way militates against the validity of its rights as pledgee. The Bank was not the original pledgee, but the assignee of the original pledgee. The pledgee was the Warehouse Company, which, received the flour in pledge from the pledgor, the

Trading Corporation, and which transferred its rights to the debt secured by the pledge and to the pledged property to The National City Bank by delivery of the pledge agreements, with the following endorsement, which we again quote for convenient reference (Tr. p. 19):

> "We have received the goods mentioned in this instrument and will hold same to the order of The National City Bank of New York and we hereby transfer all our rights under this instrument to The National City Bank of New York.
>
> The American Overseas Warehouse Co., Inc.,
> (Sgd.) C. H. Cornish,
> General Manager."

It is thoroughly settled that the assignee of a debt secured by pledge need not take possession of the pledged property. The possession of original pledgee inures to his benefit. So in *Ramboz v. Stanbury,* 13 Cal. App. 649, 110 Pac. 472, the court said (13 Cal. App. 652):

> "Appellants also contend that the evidence was insufficient to support the finding to the effect that the stock pledged as security for the payment of the note was transferred to the bank. No evidence was offered upon the subject; none was necessary. The indorsement and transfer of the note carried with it the collateral pledged as security for the payment thereof. (Civ. Code, sec. 1084; *Duncan v. Hawn,* 104 Cal. 10, (37 Pac. 626).) *Plaintiff's right to the collaterals pledged was not dependent upon the actual delivery thereof. His interest therein was by virtue of being the holder of the note, and if the payee of the note, after transferring the same, retained the collaterals, his holding was as trustee for the bank."* (Italics ours).

To the same effect are:

Church v. Swetland, (2nd C. C. A.) 243 Fed. 289, 297;

In re Milne, (2nd C. C. A.) 185 Fed. 244, 249;

Dibert v. D'Arcy, 248 Mo. 618, 154 S. W. 1116, 1126; *Holland Banking Co. v. See,* 146 Mo. App. 269, 130 S. W. 354, 356.

A mere assignment of the debt secured by a pledge carries the pledge. In the case at bar the Warehouse Company not only made such an assignment, but also specifically undertook to hold the pledged flour to the order of The National City Bank (Tr. p. 19). This clearly made the Warehouse Company bailee or custodian for the Bank. Authorities on this point are cited in our first brief (p. 20). From one of them we will briefly quote (*Atherton v. Beaman,* 264 Fed. 878, 882):

> "Under the decisions of the Supreme Judicial Court of Massachusets acceptance of an order is sufficient delivery of goods in pledge to the holder of the order, and the warehouseman, by whom the order has been accepted may become the bailee or custodian for the pledgee. (Citing cases.) These decisions are in accord with those of the federal courts."

The purpose of requiring delivery of possession to make a good pledge in the first instance is "to negative the existence of apparent ownership in the pledgor" (*Philadelphia Warehouse Co. v. Winchester,* (C. C. Del.) 156 Fed. 600, 611 and cases cited). Where a pledgee has possession, there is no ostensible ownership in the pledgor, and no need for further transfer of possession on assignment of the pledge. An analogous situation was involved in *Pierce v. National Bank of Commerce,* (8th C. C. A.) 268 Fed. 487. The court there held that where bonds were pledged with a bank, the owner could make a further pledge of his equity in them to the plaintiff by a pledge agreement, coupled with notice to the bank, no change of possession being necessary. The court said (pp. 492-493):

"One of the reasons, and probably the chief reason, for the alleged general rule that a deposit of the thing pledged is an indispensable attribute of a valid pledge, is that such a pledge is indispensable to prevent the possession by the pledgor of the thing pledged from giving to him a false credit, just as the failure to deliver personal property sold causes a false credit to the vendor and avoids the sale. This reason, however, ceases when at the time of the pledge the thing pledged is not in the possession of the pledgor, but is in the possession and control of a third party. On this account, probably, the authorities disclose the fact that in cases of the second class, of which the case at bar is one, an exception to the general rule of the necessity of the delivery of the thing pledged to the pledgee in order to make a valid pledge early arose, and has increased in strength and breadth, until it has now become as general as the rule itself, an exception to the effect that, when the thing pledged was in the possession or control of a third party at the time of the alleged pledge, it might be effectually pledged by the owner of it, or by the owner of an interest in it, without any change of possession or control of it, if notice of the fact of the pledge was given to the party in possession."

D. Answering miscellaneous arguments made under plaintiffs' Point Two.

1. The argument that the commingling by the Warehouse Company of the pledged flour with other flour, and its misappropriation of part of the mass, destroyed the Bank's pledge (Brief for Cross-Appellant, pp. 32, 37) is answered in our former brief (pp. 9-16).

To the authorities there cited we add *Bush v. Export Storage Co.* (C. C. Tenn.) 136 Fed. 918, 934-935, which holds that a pledge is not destroyed by the fact that the warehouseman and pledgor, without the pledgee's consent,

withdraw part of the pledged property and substitute other property of the same kind.

2. The argument that plaintiffs are entitled to priority on the theory that they hold legal title, whereas the Bank has only a special property as pledgee (Brief for Cross-Appellants, pp. 38-39) is also answered in our former brief (pp. 16-21).

3. The argument is made that a warehouseman cannot issue a valid warehouse receipt as security for his own debt. But no situation to which this argument could apply is involved in this case. The National City Bank is not the pledgee of the Warehouse Company, but is the assignee of a pledge from the Trading Corporation, which the uncontradicted evidence shows to have been valid.

It may be said in this connection, however, that the rule is thoroughly settled that a *public* as distinguished from a *private* warehouseman can create a valid pledge as security for his own debt merely by issuing a warehouse receipt, no delivery of possession being necessary, provided only that he has free goods on hand when he issues the receipt (*National Exchange Bank v. Wilder,* 34 Minn. 149, 24 N. W. 699, 700; *Merchants etc. Bank v. Hibbard,* 48 Mich. 118, 11 N. W. 834; *Alabama State Bank v. Barnes,* 82 Ala. 615, 2 So. 349, 350-351; *Millhiser Mfg. Co. v. Gallego Mills Co.,* 101 Va. 579, 44 S. E. 760, 764; *Maryland Casualty Co. v. Washington Loan etc. Co.,* (Ga.) 145 S. E. 761, 764, and citations; see also *Dale v. Pattison,* 234 U. S. 399; *Taney v. Pennsylvania Bank,* 232 U. S. 174; *Gibson v. Stevens,* 8 How. 384).

The case of *Fourth Street Bank v. Millbourne Mills Co.,* (4th C. C. A.) 172 Fed. 177, cited by plaintiffs (Brief for

Cross-Appellants, p. 32), involved a milling company which was a *private* warehouseman (172 Fed. 181), and which moreover, under the agreements involved in that case, had the right to mill the grain against which the receipts issued and substitute other grain therefor (172 Fed. 181-182). The reservation of such rights was in itself enough to prevent the transaction between the milling company and the receipt-holder from being a bailment or a pledge; under such circumstances it was a *mutuum*, in which title remained in the milling company (see *National Exchange Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699, 701; *Rahilly v. Wilson*, (C. C. Minn.) Fed. Cas. No. 11,532).

As illustrating the validity of a pledge created by the issuance of a document by a *public* warehouseman to secure his own debt, we will quote one passage from one of the cases cited above *(National Exchange Bank v. Wilder,* 34 Minn. 149, 24 N. W. 699, 700):

> "The rule is as universal as it is elementary that possession by the pledgee is necessary to the existence and continuance of a pledge. But this need not be actual physical possession. The delivery of a recognized symbol of title, such as a bill of lading or a warehouse receipt, which serves to put the pledgee in the control and constructive possession of the property, is sufficient. Jones, Pledges, Sec. 37. Where property is in store with a warehouseman, the delivery of the warehouse receipt to the pledgee carries with it the constructive possession, and from the time of the transfer the warehouseman becomes the bailee of the pledgee. In accordance with this theory, and in harmony with the usages of trade, the tendency of the later authorities (although the proposition has been sometimes doubted or denied) is to hold that the owner of goods, *if a warehouseman,* can pledge the same by issuing and delivering his own warehouse

receipt to the pledgee. Colebrooke, Coll., Sec. 420; *Easton v. Hodges,* 18 Fed. Rep. 677; *Merchants' Bank of Detroit v. Hibbard,* 48 Mich. 118; s. c. 11 N. W. Rep. 834. The power of a warehouseman to make a delivery in this way, in case of a sale, is well settled. *Gibson v. Stevens,* 8 How. 399; *Broadwell v. Howard,* 77 Ill. 305. And we are unable to see any good reason founded on principle for any distinction in this regard between a sale and a pledge. If any distinction is made, it must be a purely technical one, without practical value, and which would never commend itself to business men. Such distinctions should be rejected by courts. There is no good reason in the nature of things why a delivery which is sufficient in case of a sale should not be so in case of pledge. When the pledgor or the vendor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, although the actual physical possession is in himself. And where the property is a part of a larger mass of the same kind and quality, as wheat in an elevator, separation or segregation from the uniform mass is not necessary to constitute an appropriation of the property to the contract.

The vendee or pledgee becomes tenant in common with the other owners. *Forbes v. Railroad Co.,* 133 Mass. 154." (Italics by the court.)

4. There is, we submit, no merit in plaintiffs' claim that the documents held by The National City Bank and issued by the Warehouse Company in aid of a pledge, were "issued out of course of legitimate warehouse business" (Brief for Cross-Appellants, p. 7) or in the further claim that these documents were taken "with notice of being of no effect" (Brief for Cross-Appellants, p. 7). These contentions rest on the unsupported statement that "Storage of goods is the sole business" of a warehouseman (Brief for Cross-Appellants, p. 23). Apparently the theory is that a warehouseman has no power to make or

accept a pledge, and therefore that the Bank, knowing that its assignee was a warehouse company, obtained nothing by the pledge assignments. This contention is clearly contrary to the authorities, recognizing the capacity of a warehouseman to make a valid pledge, even for his own debt.

5. The rule that "when a deficiency arises in the grain, any which is still owned by the warehouseman is appropriated for the benefit of the holders of other warehouse receipts" (Brief for Cross-Appellants, p. 34, quoting 27 R. C. L. 979) is manifestly inapplicable in this case. The flour as to which defendant claims a pro rata share for The National City Bank was not "owned by the warehouseman"; it was owned by the Bank and its pledgor.

6. Plaintiffs' arguments based on the mere difference in form between their documents and the pledge agreements held by the Bank are discussed in our former brief (pp. 19-21). We may add that plaintiffs have nowhere tried to show how these arguments are applicable to the transaction involved on the cross-appeal, in which there is no difference in the form of the documents.

CONCLUSION.

We respectfully submit that the motion to dismiss defendant's appeal is without merit and should be denied. We further submit that the ruling of the court below which is involved on the cross-appeal is correct, but that its decree denying The National City Bank the right of ratable participation with respect to the transactions involved on the main appeal is inequitable and unfounded in law, and that it should be reversed.

Dated, San Francisco,
June 12, 1929.

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